No. 90-970

IN THE

Supreme Court of the United States

October Term 1990

LECHMERE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari To The
United States Court of Appeals For the First Circuit

BRIEF OF NATIONAL RETAIL FEDERATION, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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This brief is respectfully submitted on behalf of the National Retail Federation (NRF), as *amicus curiae*. Pursuant to Rule 37.3 of the rules of this Court, NRF has obtained and filed the written consent of each of the parties to the filing of this brief. NRF supports the position of the Petitioner in this case, and urges that the decision below be reversed.

I. INTEREST OF THE AMICUS CURIAE

National Retail Federation (NRF) is the largest national trade association representing the retail industry. Created by a recent merger between the American Retail Federation and the National Retail Merchants Association, the new organization

represents fifty state retail associations and twenty-seven national retail associations. In total, NRF represents over one million retail establishments in the United States, which employ nearly sixteen million people.

As a representative of such a large number of retail establishments, NRF is keenly interested in any litigation involving a retail business. The instant case is of particular interest to NRF because a very considerable number of its members own outright or have a valid leasehold interest in parking lots and other premises immediately adjoining their stores. Lechmere, Inc., Petitioner here, like many of NRF's members, since 1982 has prohibited solicitation of any kind on such premises, whether by charities, unions, or any other organizations.

What the National Labor Relations Board has done in this case and, as we will show, in virtually all of the cases following *Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. 1201 (1988) is to invalidate such long-standing no-solicitation rules when they are applied by the retail store to prevent non-employee union organizers from distributing literature and/or picketing on such store-owned premises.

In NRF's view, *Jean Country's* broad assault on a rule widely applied in the retail industry for many years which prohibits this kind of trespass on store-owned or store-leased premises such as parking lots, is a dramatic departure from this Court's views, and in particular, its long-standing precedent created by the opinion in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

NRF and its members are deeply disturbed by the change which the NLRB's decision in *Jean Country* has wrought, because it substantially dilutes, and threatens to eliminate, the legitimate private property interest which NRF members have

had under the law. This private property interest includes the right to control, in a non-discriminatory manner, the use of its wholly-owned or leased property, and to prohibit its use for unauthorized purposes.

Because of these concerns, NRF urges this court to reverse the decision of the Court of Appeals below.

II. ARGUMENT

A. *Jean Country* and its Progeny have Substantially Changed the Law as Established by This Court's Precedent.

In the landmark case of *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), a unanimous court held that an employer may validly post its property against non-employee distribution of literature, where reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message. Further, the employer's notice must not discriminate against union access by allowing other types of distribution on the employer's property. *Id.* at 112. In the instant case, it is undisputed that the employer did not allow any other types of distribution.

Other alternative means of communication of the same type available to the union in *Babcock & Wilcox* were available to the union here. It was as true here as in *Babcock & Wilcox* that:

> The usual methods of imparting information are available . . . . The various instruments of publicity are at hand. Though the quarters of the employees are scattered they are in reasonable reach. *Id.* at 113

In this case, as in *Babcock & Wilcox*, the union contacted approximately 20% of the employees through four different

mailings. It made home visits. It placed five advertisements in a daily newspaper in an area where most employees lived. Union organizers stood on the grassy apron bracketing the main entrance to the Petitioner's parking lot and there attempted to distribute handbills to persons who, because of the early prestore hour, were likely to be employees of Petitioner. Except for a brief interruption, the union was permitted to distribute on the apron because police officers confirmed that the apron was public property on which the union was entitled to carry on this activity.[1]

For almost a month, the union also picketed, stationing its pickets on the grassy apron, and for over six months, intermittent picketing of this type took place. The union also obtained automobile license numbers and, by checking out the ownership of these numbers, it secured the names and addresses of some forty-one of Lechmere's employees. It mailed its literature and authorization cards to these persons. Only one authorization card was signed and returned. Others who received the cards and literature were apparently not interested in returning them.

As pointed out by dissenting Judge Torruella in the Court of Appeals, the facts in this case are very, very similar to those in *Babcock & Wilcox*, with the possible exception that the community in which the store is located is a city larger than the one involved in *Babcock & Wilcox*. The size of the city has been regarded by the NLRB, and at least one Court of Appeals, as not significant. *NLRB v. Solo Cup Co.*, 422 F.2d 1149, 1151 (7th Cir. 1970); *Monogram Models, Inc.*, 192 N.L.R.B. 705, 77 L.R.R.M. 1913 (1971). The mere size of the city of Chicago, (a metropolitan area much larger than the metropolitan area here of Hartford, Connecticut) was, in *Monogram*, not regarded as

[1]Apparently because they did not like being videotaped engaged in such handbilling, the union representatives did not pursue this available means of communication and left the area.

rendering employees' homes inaccessible to union organizers.

Obviously, then, what has happened is that the NLRB has attempted to change the law. The Board has simply failed to apply the precedent of *Babcock & Wilcox* to a factual situation virtually on all fours with that in *Babcock & Wilcox*.

The Board, in decisions following the *Jean Country* case, engages in a semantic exercise, purporting to analyze the relative strengths and weaknesses of the union interest and the interests of the employer. But, we respectfully submit, what the Board has really done is to change its policy, by engaging in *de facto* rule-making, holding that parking lots and other retailer-owned or leased property adjacent to the stores are to be made available to non-employee union organizers, under virtually all circumstances.

B. The NLRB has Attempted, by Fiat, to Create a Separate Rule for Retail Stores.

In *Jean Country*, the Board decided to temper its application of this court's *Babcock & Wilcox* precedent by undertaking to distinguish among various strengths of rights and interests. It purports to analyze and determine in each case how "strong" is an employer's property interest and how "strong" the union's interest is in disseminating various types of publicity.

Whether a genuine attempt to define and interpret such "strengths" has been successfully accomplished in cases not involving the retail industry we have not explored in detail. However, in retail store situations, an examination of Board decisions reveals that the "analysis" is little more than a recitation of an empty litany, attempting to justify a result which would establish an easement in each and every instance on store-owned or leased parking lots, permitting almost unconditional access by non-employee union representatives.

In each of the following cases, the retailer owned either a fee simple or a lease interest in the parking lot and other adjacent premises. In every instance, the Board held that the employer could not restrict the union's distribution of literature on the store-owned or leased premises, although in each case the employer had appropriately enforced the restriction on like distribution by all others.

In *Target Stores*, 292 N.L.R.B. No. 93, 130 L.R.R.M. 1331 (1989), the union publicity was "area standards" handbilling, protesting the use by the retailer of a non-union maintenance crew to perform painting work.

In *Mountain Country Food Store, Inc.*, 292 N.L.R.B. No. 100, 130 L.R.R.M. 1329 (1989), the non-employee union representatives handbilled in support of a strike being conducted by the union at a Coca-Cola bottling plant. The handbills urged consumers to boycott products sold at the store which had been distributed by the struck bottling company.

In *Dolgin's, a Best Company*, 293 N.L.R.B. No. 102, 131 L.R.R.M. 1159 (1989) the non-employee union representative handbilled, protesting the fact that the retailer had engaged to perform store remodeling work by non-union contractors. The handbilling was of the "area wage standards" variety.

In *Granco, Inc.*, 294 N.L.R.B. No. 7, 131 L.R.R.M. 1325 (1989) the handbilling and picketing by non-employee union representatives publicized the union's claim that the store owner had committed and had not yet remedied certain unfair labor practices. The publicity urged consumers not to patronize the store. The union picketed on a public grassy island[2] but did not handbill from the island, allegedly because of safety considerations.

[2]The union had also been permitted by the store owner to picket certain designated areas near the store.

In *Century Markets, Inc.* 296 N.L.R.B. No. 5, 132 L.R.R.M. 1001 (1989), the non-employee union representatives distributed handbills supporting the union's dispute with a meat packing company, asking customers to boycott products made by the struck packing company.[3] Picketing had taken place on public property adjacent to the entrance of the shopping center. Alternative means of communication, including newspaper advertising, direct mail and hand delivery in neighborhoods was, as this court concluded in *Babcock & Wilcox*, "at hand." *Id.* at 113.

In *Target Stores*, 300 N.L.R.B. No. 136, ____ L.R.R.M. ____ (1990), non-employee union representatives were permitted to distribute handbills on store-owned or leased premises at two out of three Target stores. The handbilling was of the "area wage standards" variety, protesting that a general contractor performing remodeling work for Target used non-union carpenter subcontractors.

This undeviating decisional pattern requiring store owners to open their parking lots to non-employee representatives has been subject to exceptions in only three cases which our research has revealed. The circumstances in each were rare and unusual.

In *Target Stores*, (300 N.L.R.B. No. 136, ____ L.R.R.M. ____ (1990), Target was permitted to prohibit handbilling on leased premises at the third of three Target stores because there was available to the union a large public grassy area conveniently located near the entrance through which most Target shoppers passed.

In *Red Food Stores, Inc.*, 296 N.L.R.B. No. 62, 132 L.R.R.M. 1164 (1989) the employer's prohibition of "area standards" picketing and handbilling was found not violative of the Act

[3]The respondent had allowed the Salvation Army to solicit funds during the holdiay season, but this was found by the Board not to have been a significant dilution of respondent's property interest.

because the union representative who organized the picketing and handbilling admitted that he was totally unaware of what wages and benefits were in fact enjoyed by the employees of the store, and had no idea whether they were comparable to area standards. In addition, the second purpose of the picketing there was to protest the store's foreign ownership. This, the Administrative Law Judge found to be an "appeal to nativistic prejudice" and against public policy. While the Board did not affirm his public policy finding, it was careful to make note of the fact that picketing and handbilling for that purpose was not activity protected by the Act.

In another exceptional set of circumstances, a retailer owner was justified in prohibiting handbilling on property owned by the store, *Rockway, a Division of Federated Department Stores*, 294 N.L.R.B. No. 49, 131 L.R.R.M. 1362 (1989). The "area standards" handbilling protested the use of non-union contractors at a location where construction work was no longer occurring. The Board found it unnecessary to decide whether such handbilling was for an unlawful "hot cargo" purpose but held that the union's rights were "weak."[4]

These cases conclusively demonstrate that the Board has isolated retail facilities from *Babcock & Wilcox* criteria, and is instead, with very rare exceptions, requiring retailers to make their owned or leased parking lots available to non-employee representatives for all commonly used types of handbilling and

[4]In *Tecumseh Food Land*, 294 N.L.R.B. No. 37, 131 L.R.R.M. 1365 (1989), a store owner was found justified in restricting, but not prohibiting, the union's activities. The owner prohibited the union from having gatherings of five people in a small area immediately adjacent to the store's entrance and from impeding the flow of traffic by stationing a handbiller in the center of the respondent's driveway. Otherwise the owner had permitted the union representatives to park their cars on the store's parking lot which was normally restricted to use by customers. This case is in substantial degree inapposite. We include it only in the interest of completeness.

picketing. Any analysis of the "strengths" of the union interests, based on the *objectives* of the distributions may fairly be described as superficial, if not a sham rhetorical exercise.

The inherent fault in *Jean Country* and its progeny is the Board's departure from *Babcock's* "reasonable alternative means" test as the preeminent factor envisioned by the *Babcock* court. Instead, the measure has become but one consideration to be weighed in the "aggregate" with Section 7 and property rights.[5] The result is not the unambiguous and relatively objective measurement of *Babcock* but the unclear subjective test of *Jean Country* and *Lechmere*.[6]

The Board has ceased to follow the *Babcock & Wilcox* precedent pursuant to which, as this Court observed in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1977), (n. 41 at 205):

> In the absence of discrimination, the union's asserted right of access for organizational activity had generally been denied except in cases involving unique obstacles to nontrespassory methods of communication with the employees. *NLRB v. S & H Grossingers's, Inc.*, 372 F.2d 26 (2d Cir. 1967); *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir.1948).

Neither in the instant case nor in any of the above decisions can there fairly be said to exist the "unique obstacles to nontrespassory methods of communication" present in the cases

[5]*Lechmere*, 914 F.2d 313, 322.

[6]*Lechmere's* balancing not only undermines the substance of the accommodation in *Babcock* but also robs the threshold test of its primary procedural advantage: certain and predictable outcomes. *Lechmere* plunges the Board in its initial inquiry into an inherently subjective weighing of competing rights with few, if any, constant guidelines. Note: Employees' Right to Organize — First Circuit Upholds NLRB Order Granting Nonemployee Organizers Access to Retail Store's Parking Lot, 104 Harv. L. Rev. 1407, 1414 (1991).

cited in the *Sears* footnote. Instead, in all these cases, as in *Babcock & Wilcox*, the various instruments of publicity were "at hand." Unions, however, naturally preferred to use the parking lots owned by retail stores, because they are the most convenient means with which to contact both customers and employees. But, we respectfully submit, it was not the purpose of this Court in *Babcock & Wilcox*, to require retailers to provide non-employee representatives the ***most convenient*** or the ***most effective*** means of communication with a retailer's customer or employees.

The Court of Appeals for the Eighth Circuit concluded, on remand, in *Central Hardware Company v. NLRB*, 468 F.2d 252 (1972):

> Doubtless, solicitation on the parking lot was an easier approach to the employees than some of the other recognized means of union solicitation. However, this falls far short of meeting the union's burden of establishing that no reasonable means of communication with the employees existed other than solicitation on the parking lot. *Id*; 255-6.

And as the NLRB said in *Monogram Models, Inc.*, 192 N.L.R.B. 705, 706:

> We do not believe it wise or proper to adopt a "big city rule" and a different "smalltown rule" in applying *Babcock & Wilcox*, or to attempt to determine how big a city must be to justify the proposed differing application. Concededly, it may be more convenient and less expensive for the union to use the respondent's property for the purpose of organizing the employees here involved. That was also true under the facts of *Babcock & Wilcox*. But the test established

> there was not one of relative convenience, but rather whether the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them . . . .[7]

These observations were quoted by the Court of Appeals in *Central Hardware v. N.L.R.B.*, 468 F.2d 252, 254 (8th Cir. 1972).

This Court specifically recognized in *Babcock & Wilcox*, that non-employee union representatives "would have to use personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees." *Id.* at 111. There, as here, it would have been obviously more convenient for the union representatives if they were allowed to use the employer's property. That was not the test applied in *Babcock & Wilcox*.

It appears, however, to be the test adopted and currently applied by the NLRB, at least with respect to parking lots and other premises owned by retail stores. It has substituted the obverse doctrine that, except in very unique cases, retailers must open their property to non-employer union representatives.[8] That is precisely the opposite of the *Babcock* rule, described in *Sears* as one restricting such permission to circumstance demonstrating truly unique obstacles to non-trespassory methods of communication.

We respectfully submit that the Board should not be

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[7]It is also interesting to note that in the *Monogram Models* case, as in the instant case, the employer had refused to furnish the union with a list of employees' names and addresses. That was found to be of no significance by the Board. 192 N.L.R.B. 705, 706-707.

[8]This obverse doctrine was explicitly stated by an Administrative Law Judge whose decision was recently affirmed by the Board. *Wegmans Food Markets, Inc.*, 300 N.L.R.B. No. 114 (Dec. 11, 1990) ALJD at 12, slip op.

allowed to change the law as laid down in this Court's precedents, at least in the absence of substantial operational changes that may have developed in the industry. We see no reference in any of the recent Board decisions to any such alleged changes in the operations of the retail industry.

C. The NLRB's Retail Store Cases Represent an Attempt to Resurrect *Logan Valley* in Contravention of this Court's Decision in *Central Hardware Co. v. N.L.R.B.*.

When one examines the retail store cases to which we have referred in this brief, it is hard to avoid the conclusion that what the Board is really doing is to again raise the ghost of *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968) by applying *Logan Valley* principles to retail store NLRB cases. But this court made clear on the occasion of the Board's previous attempt, in *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972) that this was not permissible. This court spoke:

> The only fact relied upon for the argument that Central's parking lots have acquired the characteristics of a public municipal facility is that they are "open to the public." Such an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted infringement of long settled rights of private property protected by the Fifth and Fourteenth Amendments. We hold that the Board and the Court of Appeals erred in applying *Logan Valley* to this case. *Id.* at 547.

Despite this clear holding, the NLRB, in its decision here, 295 NLRB No. 15, slip op. p. 4, 131 L.R.R.M. 1480, continues to utilize the prohibited consideration, stating "We conclude that the Respondent's property right at issue is relatively substantial but note that the parking lots are essentially open to the public."

Although always reciting the litany of an alleged comparison of the relative strengths of employers' and employees' (only derivatively, union) rights, the fact is that the NLRB has, in effect, adopted a *per se* rule pursuant to which retail stores are obligated to permit non-employee union representatives access to their parking lots and other employer-owned or leased premises adjacent to the stores. In doing so, the Board has regularly followed a *Logan Valley* type of analysis. It adopts fault-ridden reasoning such as the following:

> The record disclosed that the shopping center is open to anyone who wants to enter and in fact the public is so invited. Target does not permit pedestrians from cutting across its property. While Target maintains and enforces a no-solicitation, no-distribution rule, a factor strengthening its property interest, the strength of that interest becomes less compelling when noting otherwise the open and public nature of that business property. *Target Stores*, 300 N.L.R.B. No. 136, at page 16 of the Slip Opinion.

We respectfully submit that this ill-concealed attempt on the part of the Board to resurrect the *Logan Valley* concept and its failure to apply *Babcock & Wilcox* principles to retail stores needs, once more, to be rejected by this Court. One would have thought that this Court's decision in *Central Hardware* made that rejection plain for all to see. The Board seems not

to have seen it. The principles of this Court's *Central Hardware* decision appear to require reaffirmation and warrant a reversal of the decisions of the NLRB and the First Circuit here.

CONCLUSION

For the reasons set forth above, the National Retail Federation, as Amicus Curiae, supports the position of Petitioner set forth in its Brief on Writ of Certiorari, and respectfully submits that this Court should reverse the decision of the Court below.

Respectfully submitted,

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